TR ERI AJOK A

v.

DISTRICT OFFICER OF SIMUNJAN & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG J
[JUDICIAL REVIEW NO: KCH-13JR-1-2011]
5 APRIL 2012

CIVIL PROCEDURE: *Irregularity - Procedural error - Preliminary objection - Failure to serve notice of hearing - Whether irregularity curable - Whether court had jurisdiction to dismiss application - Rules of the High Court 1980, O. 1A & O. 53 r. 4* C

CIVIL PROCEDURE: *Judicial review - High Court - Termination of Tuai Rumah (village headman) - Delayed notification of termination - Whether late communication of termination satisfied criteria of irrationality - Whether termination bad in law - Whether letter of termination null and void* D

The applicant, until the termination of his appointment, was the Tuai Rumah (village headman) of Kampung Emplas, Simunjan, Sarawak. He had held the position since 1961 but was only officially appointed to the post in April 1982. On 17 June 2011, the applicant received a letter signed by the District Officer of Simunjan ('the first respondent'), informing him of the termination of his appointment. The letter of termination was also enclosed and signed by the Director of Human Resource Management Division ('the second respondent'). The termination letter was dated 28 March 2011 while the effective date of the termination was 1 April 2011. In other words, the applicant was only informed of his termination about two and a half months after the termination had taken effect. Aggrieved, the applicant applied for leave to apply for judicial review of the decision and such a leave was granted. In granting leave, it was held that there was an arguable case whether the termination was in accordance with the Circular Memorandum ('Circular') appointing him to the post because it appeared that the revocation was backdated by two and a half months. In the present matter, the respondents raised the preliminary objection that the applicant was in breach O. 53 r. 4 of the Rules of the High Court 1980 ('RHC 1980') due to E F G H I

A the latter's failure to serve them with the notice of hearing and other documents made compulsory by the said provision. It was argued that the irregularity was incurable under O. 1A of the RHC 1980 and the court had the jurisdiction to dismiss the application.

B **Held (allowing application in part):**

(1) Although O. 53 r. 4 RHC 1980 is mandatory, that imperative provision and the duty to comply in this case had been obviated by the fact that the respondents were served with the requisite documents and represented at the leave stage. C They had also been given the opportunity to argue fully against the application for leave. The application for leave for judicial review under O. 53 r. 3(2) RHC 1980 is to be made *ex parte* but the court had, in this case, exercised its discretion to have it heard *inter parte*. D If the matter had been heard *ex parte*, there must be due compliance with service of the cause papers on the respondents which was obviously not the case here. (para 7)

(2) The respondents had been put to notice that the very same E grounds used in the leave application would be relied upon at the substantive hearing. No additional grounds were canvassed at the substantive hearing. To insist that the very same documents which had been served, be re-served would make a silly mockery of the law for the provision is designed to give F the respondents or 'persons affected' the right of representation and to be heard at the hearing. This right of the respondents had not in any way been prejudiced or compromised by the non-service of the said documents. The non-service of the same was not even a procedural irregularity G which needed to be cured and there was no reason to delve further into the legal argument of whether O. 1A RHC 1980 should be invoked in aid of the respondents. (para 8)

(3) Although it could not be denied that prior to the Circular, a H Tuai Rumah was appointed by way of 'adat' or tradition based on the support of majority of the longhouse's households, such consideration was no longer the determining factor in the post-Circular period. Even though there was probability to the applicant's assertion that he enjoyed the support and I confidence of the majority of the households in his longhouse but this was not a ground for him to continue to cling on to his post as Tuai Rumah. Further, the applicant could not argue that the Circular did not apply to him because he was

formally appointed after it came into effect and his appointment, prior to the termination, was made under it. The terms and conditions therefore bound him and the prerogative of the appointment laid solely with the State Government. (para 10)

(4) Since the applicant held the office of Tuai Rumah at the pleasure of the State Government, the grounds for terminating his appointment was not open for examination by the court. Drawing this conclusion however did not mean the end of the line for the applicant. In an application for judicial review, the court could examine the decision making process or the manner in which the decision was made, although not so much to the merit of the decision. (paras 13 & 15)

(5) The inordinate delay in conveying the decision on the termination was in complete defiance of reason and logic. The late communication of the termination had satisfied the criteria of irrationality. The decision to terminate, even if the option of payment of the honorarium was chosen, must logically and of necessity be communicated to a Tuai Rumah before the effective date of termination or at the very least, on the very day of the termination itself and ideally, the honorarium be paid at the same time as when the decision was communicated. It was not only unfair to the applicant but to the community he served for there were ramifications following such a delay. (para 17)

(6) A Tuai Rumah would and could have happily performed his official duties as Tuai Rumah such as the common act of certifying or verifying documents for his people when in fact he was no longer holding the post as one. In that circumstance, the certification or verification would be rendered invalid and may even have legal repercussions to the owner of the documents. Therefore, the act of notifying him of the termination only so many months after the effective date, even if one were to excuse the delay in payment of the honorarium, had rendered the termination bad in law and the letter of termination null and void. (paras 17 & 18)

Case(s) referred to:

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Malaysia & Anor [2008] 9 CLJ 110 HC ***(refd)***

Ottavio Quattrocchi v. Menteri Dalam Negeri Malaysia & Ors [2001] 4 CLJ 778 HC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ridge v. Baldwin & Ors [1964] AC 40 ***(refd)***

Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri and Anor [2008] 6 CLJ 235 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 53 rr. 3(2), 4

For the applicant - See Chee How; M/s Baru Bian Advocates & Solicitors
For the respondents - Saferi Ali; SC

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang J:

[1] The applicant was, until the termination of his appointment as one by the respondents, the Tuai Rumah (village headman) of Kampung Emplas situated in the district of Simunjan, First Division, Sarawak. The village is a fairly large Iban community as it has a longhouse consisting of 35 doors; one door being equivalent to a single household. He held that esteemed position amongst his villagers since 1961 but was only officially appointed to the post in April 1982. However, by a letter dated 17 June 2011 signed by the 1st respondent, the District Officer of Simunjan, the applicant was informed of the termination of his appointment, with the letter of termination enclosed and the same was signed by the 2nd respondent, the Director of Human Resource Management Division. The date of the letter of termination is 28 May 2011 and it states the effective date of the termination as 1 April 2011. In other words the applicant was only informed of his termination about two and a half months after the termination had taken effect.

[2] He had on 4 August 2011 filed an application for leave to apply for judicial review of that decision and on 11 November 2011, such a leave was granted. In granting leave, Ravinthran

Paramaguru JC held that there is an arguable case whether the termination was in accordance with the Circular Memorandum appointing him to the post because "it appears that the revocation was backdated by two and half months". A

[3] Before going into the merits of the substantive application which is now for determination before me, let me first dispose of the preliminary objection raised by the respondents. B

Non Compliance With The Rules

[4] Order 53 r. 4 of the Rules of the High Court 1980 ("RHC") provides that within 14 days after leave has been granted the applicant shall file a notice in Form III B and that a sealed copy of the form must be served "together with a copy of the statement and all affidavits in support on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said form". C D

[5] From our court record, it shows that the said notice of hearing was filed on the 22 November 2011 and given a hearing date of 19 December 2011 at 9am but which hearing was adjourned to 31 January 2012 by Ravinthran Paramaguru JC because the sealed copies of it were inadvertently not returned to the applicant's counsel. Our record also shows that Mr Saferi Ali appeared for the respondents on that first date of hearing when the adjournment was made. Thus going by the latest date of hearing given by the court, the 17th of January should be the last date when the said notice and the accompanying documents mentioned in r. 4 above should have been served on the respondent's counsel. This was not done and according to their counsel, relying on Abdul Aziz J's decision in *Ottavio Quattrocchi v. Menteri Dalam Negeri Malaysia & Ors* [2001] 4 CLJ 778; [2001] 6 MLJ 561 at p. 564, the provision of r. 4 being mandatory, the failure to comply is incurable under O. 1A of the RHC and therefore the court is not seized with the jurisdiction to entertain this application. E F G H

[6] Mr See Chee How for the applicant submitted that the failure is curable by O. 1A and that the respondents were not prejudiced by the non-service because the same statement and affidavit in support used at the leave stages are being relied upon by them at the hearing of this substantive application and which I

documents have been served on the respondents before the hearing of the application for leave. The service of the said documents on the respondents at that leave stage is not disputed.

[7] I believe Mr. See Chee How has a good point here. Whilst I do not dispute for a minute that the provision of O. 53 r. 4 is mandatory, that imperative provision and the duty to comply in this case has been obviated by the fact that the respondents were served with the requisite documents and represented at the leave stage. They had also been given the opportunity to argue fully against the application for leave. It must be noted that the application for leave for judicial review under O. 53 r. 3(2) is to be made *ex parte* but the court has in this case exercised its discretion to have it heard *inter parte*. If the matter had been heard *ex parte*, I would agree that there must be due compliance with service of the cause papers on the respondents but which was obviously not the case here. That is my first reason for agreeing with Mr See Chee How. The second is that in para. 8 of the applicant's statement filed in support of the application for leave, he has clearly stated as follows:

> At the substantive hearing of this Application, the Applicant will rely on the grounds set out herein as well as those grounds stated in the affidavit of the Applicant filed herein.

[8] The respondents, in other words have been put to notice that the very same grounds used in the leave application would be relied upon at the substantive hearing. And, as it turned out to be, no additional grounds were canvassed before me at this substantive hearing. To insist that the very same documents which has been served, be re-served would in my view make a silly mockery of the law for the provision is designed to give the respondents or "persons affected" the right of representation and to be heard at the hearing. This right of the respondents have not in any way been prejudiced or compromised by the non service of the said documents. Thus, in my view, the non-service of the same is not even a procedural irregularity which needs to be cured and I see no reason to delve further into the legal argument whether O. 1A should be invoked in aid of the respondents.

Appointment Of Tuai Rumah

[9] The Circular Memorandum dated 2 October 1980 (exhibited as MT1 to Datu Misnu's affidavit) issued by the Acting State Secretary Sarawak, regulates the terms and conditions of the

appointment of a Ketua Kaum called a Tuai Rumah for the Ibans. Firstly, it is stated in the circular at cl. 6.1 thereof that a Ketua Kaum is not a government officer. It is then provided in the circular that the power of appointment lies with the State Secretary who may delegate his authority to the resident of each division in the state (see cl. 3.1 thereof) and in respect of termination or revocation of the same, the applicable provision is cl. 3.4 thereof which states as follows:

> The appointment in the Ketua Kaum Service is made at the pleasure of the Government and may be determined by either side on giving one month's notice or in lieu of notice to pay an equivalent of one month's honorarium.

[10] This circular therefore proves that the applicant's appointment as a Tuai Rumah is contractual and it being clearly stated to be at the pleasure of the State Government, means that the appointment is at the sole discretion of the appointing authority. Though it cannot be denied that in the days of old, prior to this circular, a Tuai Rumah was (as deposed by the applicant in his affidavit in support of the leave application) appointed by way of 'adat' or tradition based on the support the appointee enjoyed from the majority of the households in the longhouse, such consideration is no longer the determining factor in the post circular period. And in this case, the applicant cannot argue that the circular does not apply to him because he was formally appointed after it came into effect and his appointment, prior to the termination, was made under it. The terms and conditions therefore bind him and the prerogative of the appointment lies solely with the State Government. Thus, even though there is probability to the applicant's assertion that he still enjoys the support and confidence of the majority of the households in his longhouse, sadly for him this is not a ground for him to continue to cling on to his post as Tuai Rumah. Now according to Haji Zainy, the applicant's service was no longer needed because being an old man of 72 years, the applicant's medical examination conducted on 8 March 2011 also shows that he is asthmatic, suffers from diabetes, high blood pressure and joint pain; common enough ailments, I would say, of the elderly and even the not so elderly (see exh. ZA-2 to his affidavit). Further, and this is more important, Haji Zaini deposed

A that the applicant has also failed to submit, since 2010, a quarterly report on his activities as the chairman of Jawatankuasa Kemajuan Dan Keselamatan Kampung (JKKK) which he headed by virtue of his office. The respondents therefore submit that he was no longer fit to hold the post. The applicant did not file any affidavit to B dispute his medical conditions nor his alleged failure to submit the quarterly reports.

[11] When the unchallenged evidence on his age, medical condition and especially the said omission as chairman of JKKK is C viewed together with my earlier consideration that he holds the post at the discretion of the State Government, no one can forcefully argue against his non-suitability to continue to hold the post. Not that I am going to anyway and this is primarily because of what was said by the Supreme Court in *Said Dharmalingam* D *Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646; [1997] 1 MLJ 352 at p. 359 where Edgar Joseph Jr FCJ quoted with approval Lord Reid's distinction of three types of dismissal cases in *Ridge v. Baldwin & Ors* [1964] AC 40 as follows:

E (i) that of a servant by a master.

(ii) **dismissal from an office held during pleasure.**

(iii) dismissal from an office where there must be something against a man to warrant a dismissal.

F **[12]** Relevant to this decision is what His Lordship said in respect of the second case:

> So far as (ii) is concerned to say that an office is held during pleasure means that the person empowered to dismiss need not G have anything against the officer, so he need not give any reason.

[13] Therefore, since the applicant held the office of Tuai Rumah at the pleasure of the State Government, the grounds for terminating his appointment is not open for examination by me. H Drawing this conclusion however does not mean the end of the line for the applicant and I said this because of another Supreme Court case, *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 also found in the same law report as *Said*'s case but at p. 145. Getting guidance again from the same I judge as that in *Said*'s case which I quoted earlier, ie, Edgar

Joseph Jr FCJ, I am reminded that there are three criteria in which judicial review of an administrative decision can be had and they are, according to His Lordship, following Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374:

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[14] I am moved to reproduce the same excerpt from Lord Diplock's judgment which was quoted by His Lordship at p. 187 of the report in respect of criteria (ii), pertinent in my view to the matters at hand:

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). *It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review. (emphasis added)

[15] The principle of *Wednesbury* reasonableness was also applied by the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143. Although the main *ratio* in *Rama Chandran*'s case is in respect of the court's power in a judicial review in relation to an award by the Industrial Court, the criteria mentioned above are observations made in relation to the general powers of the court for this kind of remedy. In addition to the above, there is sufficient case authorities in support of the statement that in an application for judicial review the court can examine the decision making process

A or the manner in which the decision is made, although not so much to the merit of the decision (see the two Court of Appeal decisions of *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri and Anor* [2008] 6 CLJ 235 and *Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Malaysia & Anor* [2008] 9 CLJ 110, B both cases cited to me by Mr Saferi Ali). The phrase "decision making process" in my view does not end when the decision is made. It ought to extend and should cover the administrative acts done up to the time when the decision is conveyed to the applicant. I must therefore now examine it in order to ascertain if C it falls within the criteria of irrationality which I have quoted above.

Termination Notice Or Honorarium

D **[16]** As stated earlier, cl. 3.4 provides two ways in which termination of the appointment can be effected; by giving one month notice or by paying a month's honorarium. The respondents have elected to do it by the payment of one month's honorarium. It is not disputed in this case that the one month honorarium was paid to the applicant herein. The payment E voucher for it is dated 13 September 2011 and exhibited as ZA-4 to Haji Zainy's affidavit.

[17] The undisputed facts as I also have mentioned earlier are that the applicant was only informed of the termination 2 1/2 F months after it took effect and he was paid the honorarium 4 1/2 months later. With respect to the respondents and fully acknowledging that they are vested with a complete discretion on who to appoint as Tuai Rumah, the inordinate delay in conveying the decision on the termination is in complete defiance of reason G and logic. The late communication of the termination, in my view, has satisfied the criteria of irrationality mentioned in Lord Diplock's judgment.

[18] The reasons for my conclusion is this. The decision to H terminate, even if the option of payment of the honorarium was chosen, must logically and of necessity be communicated to a Tuai Rumah before the effective date of termination or at the very least, on the very day of the termination itself and ideally, the honorarium be paid at the same time as when the decision is I communicated. With respect to the respondents, I am compelled to ask this pertinent question: What is the use and where lies the

logic of telling a man that he is no longer the anointed leader long after his appointment has been revoked? It is not only unfair to the applicant but to the community he serves for there are ramifications following such a delay. A Tuai Rumah in that same position the applicant would and could have happily performed his official duties as Tuai Rumah such as the common act of certifying or verifying documents for his people when in fact he was no longer holding the post as one. In that circumstance, the certification or verification would be rendered invalid and may even have legal repercussions, to the owner of the documents. Therefore, the act of notifying him of the termination only so many months after the effective date, even if one were to excuse the delay in payment of the honorarium, has rendered the termination bad in law and the letter of termination null and void. The decision to terminate him ought to be quashed, I agree but this of course does not prevent the respondents from again exercising their right under the said cl. 3.4. The application is thus allowed in terms of para. 6(a) and (b) of the statement dated 3 August 2011 with a further order that the applicant be paid the arrears of his honorarium from April 2011 until to date but minus the one month honorarium which has been paid to him following the void termination letter. Lastly, cost of the summons in chambers for dismissal of the action is fixed at RM3,000 and that of the application is fixed at RM7,000.